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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT

IN

S.B. Civil Second Appeal No.225/1981

Ramjilal S/o Shri Badri Prasad & Others
...plaintiff-appellants

Versus

Om Prakash S/o Shri Panna Lal (since deceased)
through Legal Representatives
Smt. Kushum and Others
...defendant-respondents

Date of Judgment ::: 17th of July, 2006

PRESENT

HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN

Shri R.K. Agarwal for the plaintiff-appellants
Shri R.P. Agarwal for the defendant-respondents

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BY THE COURT:-

Plaintiff-appellants have preferred this second appeal under Section 100 of the Code of Civil Procedure against the judgment and decree dated 21st of April, 1981 passed by the Additional District & Sessions Judge No.2, Dholpur in Civil Appeal No.3/80, whereby he allowed the appeal of the defendant no.1 Om Prakash and set aside the judgment and decree dated 20th of March, 1972 passed by the Additional Civil Judge No.1, Bharatpur, at Dholpur, in Civil Suit No.26/71 (380/66), whereby the lower court decreed the suit of the plaintiffs for pre-emption under Section 11 of the Rajasthan Pre-Emption Act, 1966. This court admitted this second appeal and formulated the following substantial question of law on 24.9.1982:-

"Whether the document Exhibit
A-1 dated 15.12.1959, whereby

Badri Prasad and Ramjilal renders purported to sell some immovable property to Om Prakash as vendee, can be relied on by the vendee to prove his status as a co-sharer in the immovable property, which is the subject matter of this suit for pre-emption."

Briefly stated the facts of the second appeal are that plaintiffs Badri Prasad and Ramjilal filed a suit for pre-emption in respect of the portion of property in dispute under Section 11 of the Rajasthan Pre-Emption Act, 1966 against the defendants Om Prakash and Bhagwati Prasad. It was pleaded that the plaintiffs have a right of pre-emption in respect of the portion of the property, which has been sold by the defendant no.2 in favour of the defendant no.1 through registered sale-deed dated 14.3.1966 for a consideration of Rs.500/-. In the suit it was prayed that a decree of pre-emption be passed in favour of the plaintiffs and on payment of Rs.500/- by the plaintiffs, a decree for possession be passed in favour of the plaintiffs and against the defendant no.1.

The suit of the plaintiffs was contested by the defendants. Both the defendants filed their separate written statements, wherein they denied the claim of the plaintiffs and prayed for dismissal of the suit.

On the basis of the pleadings of the parties, the learned lower court framed ten issues, which are reproduced

as under:-

"(i) Whether the plaintiffs are the exclusive owners of the portion shown by letters I and J in the plaint site plan?

(ii) Whether the "chabutra D" is exclusive owned and possessed by the plaintiff?

(iii) Whether the defendant Om Prakash and his father executed a sham sale-deed in collusion with the plaintiffs in favour of plaintiffs without any consideration and without giving any possession to the plaintiffs for the portions I and J in order to avoid the debt due to creditors? If so its effect?

(iv) Whether the defendant Om Prakash got a sale-deed written on a stamp about his own portion of the property by the plaintiffs?

(v) Whether the plaintiffs are estopped due to Sec.53 A, Transfer of Property Act from challenging the title and possession of the defendant?

(vi) Whether the defendant Om Prakash got the possession of the portions marked as I and J for a consideration of Rs.400/- from the plaintiffs?

(vii) Whether the defendant No.2 had offered the portions sold to defendant No.1 previously to the plaintiffs but the plaintiffs declined? If so, its effect?

(viii) Whether the transaction was settled before the Rajasthan Pre-emption Act came into force? If so, its effect?

(ix) Whether the site plan filed with plaint is in accordance with the site? and,

(x) Relief?

Both the parties produced the oral as well as documentary evidence in support of their cases.

The learned lower court, after considering all the facts and circumstances of the case and after scrutinizing the evidence led by the parties, decreed the suit of the plaintiff-appellants against the defendant no.1 Om Prakash and the defendant was ordered to transfer and convey the suit property to the plaintiffs for Rs.500/- on the plaintiff's depositing the price of Rs.500/-, and expenses of sale-deed and registration minus the costs of the suit within a period of 60 days, the defendant shall execute the conveyance of the suit property in favour of the plaintiffs and shall handover possession and the document of the title, failing which the plaintiffs shall be entitled to apply to the court to execute the sale-deed on behalf of the defendant. Being aggrieved with the same the defendant no.1 Om Prakash preferred an appeal. The learned first appellate court, vide its impugned judgment and decree dated 21.4.1981 allowed the appeal and set aside the judgment passed by the lower court and dismissed the suit of the plaintiffs, hence this second appeal.

Learned counsel for the appellants contended that the first appellate court has committed a serious illegality in setting aside the judgment of the lower court on the ground that Om Prakash had adverse possession over the property in dispute for more than 12 years from 15.12.1959 till 15.12.1971 whereas the plaintiffs had

already filed their suit for pre-emption in the court in the year 1966, therefore, the possession after the year 1966 could not have been considered as adverse possession in favour of Om Prakash, therefore, the learned first appellate court committed an illegality in allowing the appeal of the defendant no.1 Om Prakash and the same is liable to be set aside and the judgment of the lower court should be restored.

Learned counsel for the defendants supported the impugned judgment and decree passed by the learned first appellate court.

I have considered the submissions of the learned counsel for both the parties. It is relevant to mention that on the basis of pleadings of the parties the learned lower court framed issue no.7 - "whether the defendant no.2 had offered the portions sold to defendant No.1 previously to the plaintiffs but the plaintiffs declined? If so, its effect?" The lower court decided issue no.7 and recorded a finding that the defendant no.2 had offered the portion sold to the defendant no.1, firstly to the plaintiffs but they refused to purchase the same for a consideration of Rs.500/- and they offered only Rs.250/-. However, the lower court ultimately came to a conclusion that the defendant no.2 had given an oral offer for sale of the disputed portion of the house to the plaintiffs, which cannot be said to be a notice as required under Section 8 of the Rajasthan Pre-Emption Act, 1966, therefore, oral offer is not sufficient. The finding of the lower court in respect

of issue no.7 is reproduced as under:-

"20. It is admitted by the plaintiff Badri Prasad in his cross-examination that there was negotiation between him and the defendant No.2 regarding the sale of the disputed portion of the house to him but he cannot say as to why the talks failed. As against this the defendant Badri Prasad has deposed that he had offered the disputed portion to the plaintiffs but they refused to pay more than Rs.250/- and therefore the transfer could not be finalized. I have examined the evidence of the two parties and have reached to the conclusion that the disputed portion of the house was earlier offered for sale to the plaintiffs but they refused to purchase it for Rs.500/-. This is clearly stated by the defendant Badri Prasad. In view of this statement of the defendant and in view of the expressed inability of the plaintiff to disclose the cause of the failure of the talks the version of the defendant can safely be preferred to that of the plaintiffs.

21. Even though the above

finding of fact has been recorded in favour of the defendants yet in my opinion the plaintiffs are not estopped from claiming right of pre-emption in this suit. In view of the clear and mandatory provision of Section 8 of the Rajasthan Pre-emption Act the estoppel even if any of the plaintiffs is not of much avail and they are entitled to file and maintain this suit. The issue is decided accordingly."

The first appellate court also considered the finding of the lower court in respect of issue no.7 in para 13 of the judgment and concurred with the finding of the lower court to the effect that before sale of portion of the property by the defendant no.2 to the defendant no.1, the same was offered to the plaintiffs but it was an oral offer and the same was not in accordance with Section 8 of the Rajasthan Pre-emption Act, 1966, therefore, the oral offer cannot be treated as an offer in accordance with Section 8 of the Rajasthan Pre-emption Act, 1966. However the first appellate court confirmed the finding of the lower court to the effect that the oral notice was given by the defendant no.2 to the plaintiffs before sale of the disputed portion of the house to the defendant no.1. There is concurrent finding of fact in this regard by both the courts below.

The Hon'ble Supreme Court in the case of Indira Bai

Vs. Nand Kishore (AIR 1991 SC 1055) considered the provisions of Section 8 of the Rajasthan Pre-Emption Act, 1966 and held as under:-

"4. Legal approach of the High Court, thus that no estoppel could arise unless notice under Section 8 of the Rajasthan Pre-emption Act (in brevity 'the Act') was given by the seller and pre-emptor should have had occasion to pay or tender price ignores the fallacy that estoppel need not be specifically provided as it can always be used as a weapon of defence. In the Privy Council decision, referred earlier, the Court was concerned with Oudh Laws Act (18 of 1876) which too had an identical provision for giving notice by seller. No notice was given but since pre-emptor knew that the property was for sale and he had even obtained details of lots he was precluded from basing his claim on pre-emption."

The Hon'ble Supreme Court specifically considered the same provision of the Rajasthan Pre-Emption Act itself and held that a right of pre-emption is a weak right and estoppel can be good defence. The Hon'ble Apex Court further held that failure to serve notice by vendor on pre-

emptor does not render sale void. The Hon'ble Supreme Court considered the effect of giving notice and on a finding of fact that notice was given to plaintiff then the principle of estoppel was held to be applicable.

So far as the present case is concerned I have already mentioned above that there was a specific issue framed by the lower court i.e. issue no.7 and both the courts below have recorded a concurrent finding in this regard that before affecting the sale of the disputed portion of the house by the defendant no.2 to the defendant no.1, an offer was given by the defendant no.2 to the plaintiffs to purchase the same but they refused to purchase the same and in these circumstances, the principle of estoppel is fully applicable and the present case is fully covered by the judgment of the Hon'ble Apex Court in Indira Bai's case (supra)

In view of the decision of the Hon'ble Supreme Court in Indira Bai's case (supra), it is clear that the present suit for right of pre-emption itself was not maintainable as the plaintiffs had lost/waived their right of pre-emption in respect of the portion of property in dispute as they failed to purchase the same when it was offered to them, by the defendant no.2 before execution of the sale-deed by the defendant no.2 in favour of the defendant no.1. In these circumstances I find that in the facts and circumstances of the present case and in view of the concurrent finding in respect of issue no.7 by both the courts below I find that the plaintiffs had no right of

pre-emption in the property in dispute and their suit for pre-emption itself was not maintainable.

Although, I have already held above that the suit for pre-emption itself was not maintainable but now the question arises in this second appeal is as under:-

“whether when a suit itself has been held to be not maintainable in view of the law laid down by Hon'ble the Supreme Court in Indira Bai's case (supra), is it necessary to consider and decide the question formulated by this court while admitting the appeal?”

Normally the second appeal is heard on the question formulated by the High Court at the time of admission of the appeal but so far as the present case is concerned, the suit itself was not maintainable in view of the judgment of the Hon'ble Supreme Court, which is binding on this court, then hearing of appeal on the formulated question of law and decision thereon would be only a futile exercise as the result of the appeal will be the same as the suit of the plaintiff itself was not maintainable, therefore, in my opinion, where a finding has been recorded by a court that suit itself is not maintainable then it is not necessary to consider the formulated question relating to merits of the case. In these circumstances I do not think it fit and proper to consider and decide the question of law formulated by this court on 24.9.1982 while admitting the

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appeal.

In view of my above discussion and finding that the suit of the plaintiff in the present case was not maintainable in view of the decision of the Hon'ble Supreme Court in Indira Bai's case (supra), I do not find any merit in this second appeal filed by the plaintiff-appellant and the same is accordingly dismissed and the suit of the plaintiff-appellant is dismissed as not maintainable. There will be no order as to costs.

(Narendra Kumar Jain) J.

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